IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 203

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

DAVE MARKS, TRUSTEE IN BANKRUPTCY OF BELMONT CANDY COMPANY, BANKRUPT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWARD ROTHBART,
J. M. ROSENFIELD,
of Chicago, Illinois,
Attorneys for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

SUBJECT INDEX

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

DAVE MARKS, TRUSTEE IN BANKRUPTCY OF BELMONT CANDY COMPANY, BANKRUPT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Manufacturers' Finance Company, a corporation, respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Sixth Circuit to review a decree of that court entered April 21, 1944*, affirming a decree of the United States District Court for the Western District of Tennessee, Western Division. A certified transcript of the record in the case, including the proceedings in said Circuit Court of

* Petition for rehearing denied May 29, 1944.

Appeals, is furnished herewith in accordance with the rules of this Honorable Court.

Statement of Matters Involved.

In a voluntary bankruptcy proceeding, petitioner intervened, claiming that some two years prior to bankruptcy it had entered into a contract with bankrupt to purchase its accounts receivable. The identical contract was upheld and enforced by this Court in *Manufacturers' Finance Company* v. *McKey,* 294 U. S. 442, 79 L. ed. 982. It provided for the purchase of accounts receivable, petitioner paying 100 per cent of the net amount of all accounts purchased, 77 per cent of which was paid upon acceptance of the accounts and the remaining 23 per cent, less certain charges, was paid upon collection of the accounts (R. 10a).

Petitioner alleged (R. 5) that pursuant to the terms of the contract it purchased numerous accounts re-receivable which remained unpaid; that sums had been collected on such assigned accounts by both the receiver and the trustee in bankruptcy. It prayed that the court direct the receiver and the trustee to account for all moneys collected by them on the assigned accounts, that they be restrained from making further collections, and be directed to transmit all future collections thereon to petitioner. The receiver answered (R. 18) that a small sum collected by him on accounts had been turned over to the trustee. The trustee (R. 11) admitted certain additional collections but alleged that all of the assignments after July 1, 1932 (the date four months prior to the date of bankruptcy) constituted preferences and prayed for an order upon petitioner to pay the trustee the full amount of all such accounts. The trustee asked that his answer be considered as a request for

affirmative relief. Thereafter the trustee filed a supplemental answer and petition (R. 24) and later a further petition, called an amended and supplemental answer and cross petition (R. 56), all asserting the invalidity of the assignments subsequent to July 1, 1932.

The District Court held (R. 271) that the contract between the parties was entered into in due course and until July 1, 1932 performed by both parties; that during the latter part of June, 1932 a diversion of funds took place, bankrupt diverting certain collections made by it on assigned accounts (R. 269); that on July 1, 1932 bankrupt was indebted to petitioner in the sum of $12,214.20, as security for which petitioner held accounts of bankrupt in the aggregate amount of $18,-632.85 (R. 271). The conclusion of the District Court was (R. 293) that it was impossible, from the record, to tell what accounts were collected after July 1, 1932, there being no way to distinguish the collecitons made on accounts on hand July 1, 1932 from collections on accounts purchased thereafter; that the transactions of the parties were bona fide in every respect up to July 1, 1932, all of the accounts being obtained for a present consideration and in due course of business (R. 293, 294); that if the indebtedness of $12,214.20 owing July 1, 1932 had been paid out of accounts on hand at that time there could be no element of preference (R. 294). However, the court held that since the record did not show specifically the source of the collections that were made, and notwithstanding that the trustee was presenting affirmative causes of action against petitioner, it was reasonable to presume that a substantial part of the indebtedness of $12,214.20 owing on July 1, 1932 was paid out of subsequently assigned accounts; that therefore, it was proper to assume that this entire in-

debtedness was paid exclusively out of accounts assigned subsequent to July 1, 1932 (R. 294, 295), which amounted to a preference recoverable by the trustee, together with interest from the date of bankruptcy, for which amount, and some smaller items, judgment was entered, together with interest amounting to $10,417.24.

The Circuit Court of Appeals affirmed the judgment, its opinion being unreported as yet, but contained in the record (R. 338). While the opinion recognized that the burden of proof was on the trustee to establish every element of a preference (Op. R. 340) the theory of the District Court was nevertheless affirmed by the Circuit Court of Appeals. It affirmed the District Court's opinion that the transactions between the parties prior to July 1, 1932 were bona fide in every respect and also held that if the indebtedness of $12,214.20 owing petitioner on July 1, 1932 was paid out of subsequently assigned accounts, the full amount thereof would constitute a recoverable preference (R. 347). Instead of requiring the trustee, however, to establish that the $12,214.20 was paid to petitioner out of accounts assigned subsequent to July 1, 1932, the court held that since the record did not show what part, if any, was paid out of subsequently assigned accounts, it would be presumed that the entire indebtedness was paid out of accounts subsequently assigned (R. 348). The opinion of the Circuit Court of Appeals is specifically based on this theory.

In other words, it was held that petitioner had received a preference in that the indebtedness of $12,214.20 was paid exclusively out of accounts assigned after July 1, 1932—and, therefore, that no part of such indebtedness was paid out of the proceeds of the accounts on hand on July 1, 1932. However, as we pointed

out above, the record contains no evidence whatsoever as to the source of the funds paid to petitioner to retire this indebtedness. Both courts found that it cannot be determined from the record whether the collections made after July 1 (which were in the most part collected by bankrupt and remitted by it to petitioner) were collections of accounts assigned prior to or after July 1, 1932, or both.

Questions Presented.

1. Is a decree warranted which allows the recovery of an alleged preference on the ground that a secured indebtedness was paid wholly out of funds other than the proceeds of the security which secured the indebtedness, where the record wholly and *admittedly* fails to show that such indebtedness was paid, in whole or in part, out of funds other than the proceeds of the security which validly secured the indebtedness?

2. Where a trustee in bankruptcy sues to recover an alleged preference on the ground that a secured indebtedness was retired with funds other than the proceeds of security actually securing the indebtedness, is the burden upon the trustee alleging such preference to establish the identity of the funds allegedly used to retire the indebtedness, or must the defendant establish that the trustee's contentions are not factually correct?

Reasons for Granting Writ.

1. The decision of the court below in this case is in conflict with the decision of the Circuit Court of Appeals for the 2nd Circuit in the case of *Israel* v. *Woodruff*, 299 Fed. 454; in conflict with the decision of the Circuit Court of Appeals for the District of Columbia in *Brown, et al* v. *Christman, et al,* 126 Fed. (2d) 625; and in con-

flict with the decision of the Circuit Court of Appeals for the 9th Circuit in *Stennick* v. *Jones, et al,* 282 Fed. 161, on the same matter.

2. The court below has decided an important question of federal law in a way probably untenable and in conflict with applicable decisions of this Court and the weight of authority.

3. The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, sitting at Cincinnati, Ohio, commanding said court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Sixth Judicial Circuit confirming the decree of the District Court be reversed and remanded and that petitioner be granted such other and further relief as may seem proper.

EDWARD ROTHBART,
J. M. ROSENFIELD,
Attorneys for Petitioner.